No. 76-881

# In the Supreme Court of the United States

OCTOBER TERM, 1976

THE FIRST BANK AND TRUST COMPANY, PETITIONER

*v.*

ROBERT BLOOM, ACTING COMPTROLLER OF THE CURRENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

DANIEL M. FRIEDMAN,
*Acting Solicitor General,*
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*Washington, D.C. 20530.*

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Petitioner contends that the Comptroller of the Currency failed adequately to explain his decision granting a competitor's application to establish a branch bank in the State of Massachusetts.

The National Bank Act subjects national banks to the same branch location restrictions that state law imposes on state banks. 12 U.S.C. 36(c). Massachusetts law limits bank branches to cities or towns in the same county "having no commercial banking facilities or having banking facilities which * * * are inadequate for the public convenience." Ann. L. Mass., C. 172, §11(a) (1970). One of the respondents here, a national bank within the State of Massachusetts, petitioned the

Comptroller of the Currency to establish a branch bank within Massachusetts. Following a hearing at which petitioner protested, the Comptroller granted the application. Petitioner then brought suit in the United States District Court for the District of Massachusetts, which granted summary judgment for the Comptroller and the successful applicant (Pet. App. 17-23).

Petitioner appealed, and the court of appeals vacated the district court's decision and remanded the case to the district court, stating (Pet. App. 27):

> We agree that there would be enough support in the record concerning possible inadequacy and inaccessibility of present banking facilities in Chelmsford to provide a rational basis for the Comptroller's approval. But the record leaves us in doubt whether the Comptroller took Massachusetts' statutory standard into account.

The court of appeals therefore remanded to the district court for the single purpose of determining whether the Comptroller had taken into account the relevant state legal standard (Pet. App. 29).

On remand, the government filed a supplemental opinion of the Comptroller, indicating that Massachusetts law had been taken into account and reaffirming the finding that the banking facilities in the town in which the branch was to be established were "inadequate for the public convenience" within the meaning of the Massachusetts statute (see Pet. App. 38-41). The district court accordingly entered judgment for the defendants (Pet. App. 30-33).

Petitioner appealed again. The court of appeals affirmed *per curiam* (Pet. App. 34-37), holding that the Comptroller's assertion in his supplemental opinion that the relevant



state standard "was considered," coupled with his reiterated approval of the application in light of the Massachusetts statute, was sufficient to establish that his decision was "in accordance with law" as required by 5 U.S.C. 706(2)(A) (Pet. App. 36).[1]

The judgment of the court of appeals is correct and does not warrant review by this Court. Both the district court and the court of appeals have at all times recognized that there is "enough support in the record concerning possible inadequacy and inaccessibility of present banking facilities in Chelmsford to provide a rational basis for the Comptroller's approval" (Pet. App. 27). The court of appeals remanded only because the administrative record lacked an explicit statement that the Comptroller had considered Massachusetts law. The court of appeals contemplated that "the Comptroller's good faith representation of compliance will effectively end judicial review" (Pet. App. 29).

Petitioner contends that the Comptroller's supplemental opinion "does not in any way provide an explanation of the original agency determination" (Pet. 15). Such an explanation was not necessary, for the administrative record itself was sufficient to support the Comptroller's decision. But the supplemental findings of the Comptroller, which were based upon a record that included

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[1]The court of appeals also affirmed the district court's denial of petitioner's request for further discovery (Pet. App. 36, 37):

> The testimony of subordinates relative to the Comptroller's initial decision was not contemplated and is not necessary to effective judicial review in the absence of circumstances not present here indicating that the Comptroller's representation of compliance is in bad faith. *See South Terminal Corp.* v. *Environmental Protection Agency*, 504 F. 2d 646, 675 (1st Cir. 1974).

an extensive field investigation and a public hearing, did explicitly set forth the basis for the Comptroller's conclusion that the Massachusetts state standard was met.[2] The reaffirmed decision, combined with detailed findings and a complete administrative record, amply comports with the requirements of *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402.[3] See *Bank of Commerce of Laredo* v. *City National Bank of Laredo*, 484 F. 2d 284, 288 (C.A. 5), certiorari denied, 416 U.S. 905; see also *City National Bank* v. *Smith*, 513 F. 2d 479, 484-485 (C.A. D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.*

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[2]Petitioner contends that the Comptroller made a "substantial factual error" by incorrectly referring to petitioner as "the only existing commercial facility in Chelmsford" (Pet. 15). The Comptroller's meaning is clear, however, since at three other points in the supplemental opinion he correctly refers to petitioner as the only existing commercial facility located within the applicant bank's proposed service area within Chelmsford (Pet. App. 39-40). The other outlets petitioner refers to (Pet. 15) were located outside this service area.

[3]This Court held in *Citizens to Preserve Overton Park* that requiring the administrative officials who participated in the decision to give testimony explaining their action "is usually to be avoided" (401 U.S. at 420) and that in appropriate cases "post hoc" findings would provide an acceptable basis for review (401 U.S. at 419-421). See also *Camp* v. *Pitts*, 411 U.S. 138.